Supreme Court, U.S.
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No. 98-56

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

MELVIN HARWICK,
Petitioner,

vs.

DWAYNE "ANDY" ANDERSON, INDIVIDUALLY AND AS SHERIFF OF MCCLAIN COUNTY, OKLAHOMA; MCCLAIN COUNTY, OKLAHOMA, A POLITICAL SUBDIVISION OF THE STATE OF OKLAHOMA, BY AND THROUGH ITS BOARD OF COUNTY COMMISSIONERS; AND JOHN DOES, UNKNOWN JAILERS AND DEPUTIES OF MCCLAIN COUNTY, OKLAHOMA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Gayla I. Jones
COLLINS, ZORN, JONES & WAGNER, P.C.
429 N.E. 50th Street, Second Floor
Oklahoma City, OK 73105-1815
Telephone (405) 524-2070
Facsimile (405) 524-2078

Counsel for Respondents

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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STATEMENT OF THE CASE

This Petition seeks review of the limited question of whether a county sheriff may be held liable in his official capacity for the acts of his employees on the basis of vicarious liability. As detailed below, there is no compelling reason for review of this legal question which has been previously settled by this Court. Substituting fiction for fact, Petitioner has grossly distorted the cause of his arrest, subsequent incarceration and policy of the Respondent sheriff.

This case involves the Petitioner Melvin E. Harwick who intentionally let the only mode of transportation available to his four children and ex-wife become repossessed in violation of his divorce proceedings temporary order. As a result, the McClain County, Oklahoma state court judge issued a contempt citation for Petitioner's violation. Petitioner disregarded the contempt citation and failed to appear for the hearing. Subsequently, the judge issued a bench warrant for Petitioner's failure to appear on the contempt citation and set bond on the face of the warrant at $5,000.00 cash. This cash bond was the nearest whole dollar amount to the amount Petitioner was in arrears in his financial obligation to his children.

Two days prior to his arrest, Petitioner learned of the bench warrant, but did not contact the issuing judge, the bailiff, the sheriff's office or his own counsel. On August 18, 1995, Petitioner was arrested by the Oklahoma County Sheriff's Office pursuant to the warrant and subsequently transported to the McClain County Jail.

Petitioner brought this civil rights action pursuant to 42 U.S.C. § 1983, against, among others, Respondent

Dwayne "Andy" Anderson as Sheriff of McClain County. The petition seeks review limited to the question of vicarious liability of the Respondent sheriff in his official capacity.

A. The Petition Misstates the Facts Material to the Consideration of the Question of Whether the Respondent Sheriff is Vicariously Liable for the Acts of His Employees.

Petitioner admitted that the Respondent Sheriff was not at fault for Petitioner's arrest. (R. 43, Ex. A, pp. 201-2). Petitioner admitted that the only reason he sued the Respondent sheriff is, because as the sheriff, he is responsible. Petitioner has no evidence of any personal participation by the sheriff in the incident giving rise to this lawsuit. (R.43, Ex. A, pp. 237-40). Respondent sheriff testified that Petitioner's incident is the only one of which the sheriff is aware. (R.43, Ex. C, p. 67). Petitioner admitted that he is not aware of any unconstitutional policy of the Respondent sheriff which deprived Petitioner of a constitutional right. (R.43, Ex. A, pp. 240-41).

B. The Petition Presents Facts Unsupported by the Record and Immaterial to the Question Presented for Review.

Petitioner contends he was arrested pursuant to an out of county bench warrant based on an erroneous allegation of nonsupport and was not in contempt of any order. Assuming, *arguendo*, these contentions are true, they are immaterial to the question presented for review. In other words, whether the state court judge was incorrect in his assessment of Petitioner is irrelevant to the Respondent's policy concerning arraignments. Furthermore, Petitioner's contention that he

was arrested on an erroneous allegation is not supported by the referenced Appendix 4 or the record.

The contemptuous nature of Petitioner's "fact" number 7, albeit immaterial, requires a response. It is unimaginable how Petitioner can repeatedly state that he "was not in contempt of any order," while he allowed the only mode of transportation available to his four children and ex-wife who required medical care to become repossessed in violation of the order in *Harwick v. Harwick*, District Court of McClain County, Case No. FD-94-205. Certainly, Petitioner and his counsel would not have agreed that Petitioner was to provide a substitute vehicle if he had not been in contempt of the state court's order. (R.47, Ex. J, Temporary Order filed March 28, 1995, Citation for Indirect Civil Contempt filed April 5, 1995, Court Minute filed August 11, 1995).

Petitioner's statement that he "repeatedly requested to be brought before the Court during his detention and informed the jail personnel of his right to an arraignment," is a blatant misrepresentation of the evidence. The deposition testimony cited by Petitioner in his Appendix 10 does not support such a contention. The fact that the state court judge was aware that Petitioner was in jail and wanted an arraignment does not equate to Petitioner repeatedly informing jail personnel of his right to an arraignment.

C. The Petition Misrepresents the Respondent's Policy Concerning Arraignments.

The fact that no written policy exists in "McClain County" with regard to a bench warrant arraignment procedure is immaterial to whether vicarious liability exists in this case. Petitioner's assertion that "it is the policy of

McClain County to utilize bench warrants as a collection device," is a misstatement of fact. Petitioner's assertion is nothing more than argument not factually supported by the record. The deposition testimony cited by Petitioner in Appendix 6 does not support this argument.

Petitioner's contention that the Respondent knew of at least ten occasions where civil arrestees were held without arraignment until they posted a cash bond is also a misstatement of fact. The testimony cited in Appendix 7 does not lead to the unsupported assumption that any individual has ever been detained without an arraignment due to his failure to post bond.

REASONS FOR DENYING THE WRIT

The Petitioner's claim that the courts below erred in determining that the Respondent was not vicariously liable for the acts of his employees under 42 U.S.C. § 1983 does not warrant review by this Court. The decision below was a correct application of settled law, and no conflict among the circuits is alleged.

In *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), this Court addressed local government liability under 42 U.S.C. § 1983. In *Monell*, this court rejected government liability based on the doctrine of vicarious liability. *Id.* The Court held that a government entity is only liable under Section 1983 when the constitutional injury can fairly be said to have been caused by that entity's own policies and customs. *Id.* Thus, a government body cannot be held liable under § 1983 merely because it employs a tortfeasor. *Id.* at 691-92.

In furtherance of his argument that vicarious liability exists in this case, Petitioner states, "a sheriff is statutorily liable in a section 1983 action whenever a sheriff, in a position of responsibility, knew or should have known of the misconduct, and yet failed to prevent future harm." (Petition at 9). Petitioner contends that this "statutory liability" is created as a result of Oklahoma law, under which a sheriff is responsible for the proper management of the jail in his county and the conduct of his deputies. (Petition at 9). A violation of state law, however, is not a basis for a Section 1983 action since 42 U.S.C.§ 1983 provides a remedy for deprivation of rights secured by the Constitution and laws of the United States. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982) (emphasis added).

Petitioner also incorrectly intertwines the requisites for individual liability with those of official liability. Petitioner states that because he could "not actually name the jail personnel he is being denied what only amounts to fundamental justice." (Petition at 6). Petitioner further states he demanded their names but was denied the same. (Petition at 7, 12). These statements are unsupported by the record as well as even a citation to the record. Furthermore, these statements reflect Petitioner's fundamental misunderstanding of individual liability which requires evidence of personal participation in the alleged harm before liability may attach. *Bennet v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976).

To establish personal liability in a Section 1983 action, it is enough to show that the individual, acting under color of state law, caused the deprivation of a federal right. A greater burden, however, is required in an official capacity suit. In an official capacity suit, a plaintiff must prove that his injury was attributable to a "policy" or "custom" of a county. *City of St. Louis v. Praprotnick*, 485 U.S. 112 (1988).

Before a plaintiff can meet his burden of proof, he must show not only that an official policy or established custom exists, but also that such a policy or custom caused him to be subjected to a deprivation of his constitutional rights. *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). *See Hinton v. City of Elwood, Kan.*, 997 F. 2d 774, 782 (10th Cir. 1993) (plaintiff must show that there is a direct causal link between the policy or custom and the injury alleged). Furthermore, "[i]f the plaintiff asserts the alleged custom or policy comprised a failure to act, he or she must demonstrate the municipality's inaction resulted from deliberate indifference to the rights of the plaintiff." *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996)(citations omitted).

In the present case, there is no evidence suggesting the Respondent sheriff has an officially adopted policy favoring the detention of inmates without an arraignment. If a violation cannot be characterized as officially adopted policy, then the municipality can be held liable only if the practice is so permanent and well settled as to constitute a custom or usage with the force of law. *Lankford v. City of Hobart*, 73 F.3d 283, 286 (10th Cir. 1996). In order to establish a custom, the actions must be persistent and widespread practices of the officials. *Id.*

An inference that a policy exists based on the isolated conduct of an officer and then holding a municipality liable as a result of that policy amounts to the theory of strict respondeat superior liability expressly rejected in *Monell*. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 831, 105 S. Ct. 2457, 85 L. Ed. 2d 791 (1985). Where a plaintiff seeks to impose municipal liability on the basis of a single incident, the plaintiff must prove the single incident was caused by an existing, unconstitutional municipal policy. *Jenkins v. Wood, supra.*

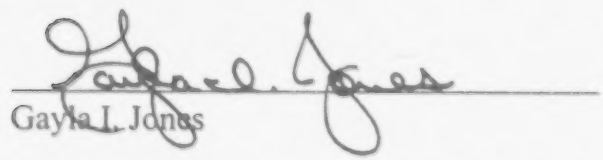
With regard to Petitioner's claim that vicarious liability stems from a failure to train, this Court has recognized "that there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under Section 1983." *City of Canton v. Harris*, 489 U.S. 378 (1989). This Court did not include vicarious liability as one of those limited circumstances. *Id.*

Petitioner is challenging well established law, and his effort to do so does not call for this Court's review.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,



Gayla L. Jones

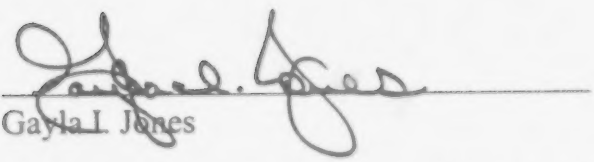
COLLINS, ZORN, JONES & WAGNER, P.C.
429 N.E. 50th Street
Second Floor
Oklahoma City, OK 73105-1815
(405) 524-2070
(405) 524-2078 Facsimile

Counsel for Respondents

CERTIFICATE OF SERVICE

The undersigned, to be admitted to practice before the Supreme Court of the United States effective August 7, 1998, hereby certifies that on August 6, 1998, three copies of the foregoing Brief in Opposition were served, by certified mail, postage prepaid, to the following counsel of record for Petitioner:

George Caporal
221 S.W. 5th
Oklahoma City, OK 73109



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(405) 524-2078 Facsimile